Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From July 1, 1958

Through September 30, 1958

VOLUME 92

JOHN PATTERSON, Attorney General

1959

QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1958, through September 30, 1958, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

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Confidential Assistant

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Assistant Attorney General Assigned to the Department of Finance:
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Assistant Attorney General Assigned to the Department of Revenue:
Willard W. Livingston
H. Grady Tiller
William H. Burton, Jr.
James R. Payne
Arthur Joe Grant
B. Frank Loeb

OPINIONS

July 2, 1958

Honorable Sam Drinkard
Tax Assessor
Marengo County
Linden, Alabama

Taxation—Ad Valorem Taxes—Property—Trailers..

House Trailers are subject to assessment for ad valorem taxes.

Opinion by Assistant Attorney General Grant.

Dear Sir:

Your request for an official opinion, bearing date of June 5, 1958, is as follows:

"Please render me an official opinion on the following:

"Are house trailers taxable in Alabama.

"During the past two years we have several hundred house trailers located here in the county. Some of the trailers remain on wheels, some are stationed on wood blocks and some on cement blocks. Of course, some of these trailers have two, four, or six wheels, some are pulled behind automobiles and some behind trucks. Quite a few of these trailers have been in the county for more than a year. I want to know whether or not these trailers are taxable in Alabama provided they have been in the State the required period of time.

"Please give me a prompt opinion on the matter."

I am of the opinion that your question should be answered in the affirmative.

Title 51, Section 21, sub paragraphs (a) to (l), both inclusive, Code of Alabama 1940, contains provisions for subjecting certain named or specified properties to ad valorem taxation except where expressly exempted by law. House trailers, by this designated name, are not included within these specified properties. Sub paragraph (n), Section 21, supra, however, provides for the assessment of additional properties and is quoted as follows:

"(n) all other property real, personal or mixed not herein before specified, of whatever class, whether ejusdem generis or not, except as herein specifically exempted, which said property shall be assessed and specifically described. (1935 p. 256)."

I am of the opinion that house trailers, as property, would be and are included within the meaning of provisions of sub paragraph (n) supra, and are thus subject to assessment for ad valorem taxes.

Very truly yours,

JOHN PATTERSON
Attorney General

July 7, 1958

Honorable L. W. Gentry
Superintendent of Banks
State Banking Department
CAPITOL

Banks and Banking—Hospitals—County Boards of Education—City Boards of Education—Warrants.

1. Warrants of County Hospital Boards, County Boards of Education, and City Boards of Education, are not general obligations of issuing agencies respectively.

Opinion by Assistant Attorney General Young.

Dear Sir:

Your request for an official opinion bearing date of May 12, 1958 is as follows:

"One of the banks under our supervision has raised the question as to the legality or rating of warrants issued by school and hospital boards. The questions that we desire your office to answer for us are as follows:

"1. Are warrants of the Escambia County Hospital Board general obligations of a political subdivision of the State of Alabama?

"2. Are warrants of the Escambia County Alabama Board of Education general obligations of a political subdivision of the State of Alabama?

"3. Are warrants of the City of Brewton Alabama Board of Education general obligations of a political subdivision of the State of Alabama?"

It is my opinion that all three of your inquiries above should be answered in the negative.

Pretermitting a consideration here of whether the Escambia County Hospital Board, the Escambia County Alabama Board of Education, and City of Brewton Alabama Board of Education are political subdivisions of the State, it is clear that any securities issued under the authority of the Constitution of Alabama 1901, Amendment LXXVI; Act No. 46, General and Local Acts of Alabama 1949, page 68 (codified as Title 22, §204(25), Code of Alabama 1940, Cumulative Pocket Parts); Act No. 601, General and Local Acts of Alabama 1949, page 935 (codified as Title 52, §235(2), Code of Alabama 1940, Cumulative Pocket Parts) and Act No. 528, General Acts of Alabama 1953, page 735 (codified as Title 52, §235(3), Code of Alabama 1940, Cumulative Pocket Parts) are not general obligations of the issuing agency, and are not, in my opinion, exempt from the provisions of Title 12, §24, U.S.C.A. which limits investments of member banks of the association created thereunder.

As for securities issued by the Escambia County Hospital Board the Constitution of Alabama of 1901, Amendment LXXVI specifically states:

> "No securities issued or contracts made by a county under the authority of this amendment, which are payable solely out of the proceeds of said tax (special county tax for public hospital purposes), and no securities issued or contracts made by any such public corporation, whether or not issued or made under the authority of this amendment, shall be construed to be bonds of the county or of a political subdivision thereof within the meaning of section 222 of the Constitution, or construed to create or constitute an indebtedness of the county within the meaning of section 224 of the Constitution." (Parenthesis Supplied.)

Thus, Title 22, §204(25), supra, provides:

> "Securities issued by the corporation shall not be general obligations of the corporation but shall be payable solely from the sources specified in the proceedings wherein the securities are authorized to be issued. . . . All debts created and securities issued by the corporation shall be solely and exclusively an obligation of the corporation and shall not create an obligation or debt of the State of Alabama or of any county or municipality. The faith and credit of the State of Alabama or of any county or municipality therein shall never be pledged for the payment of any debt incurred or securities issued by the corporation."

Similarly, securities issued under the authority of Act No. 601, supra, and Act No. 528, supra, clearly are not general obligations of the issuing authority. Act No. 601 provides:

> "In any county in which a special sales tax, gross receipt tax or use tax is levied by local act of the Legislature of Alabama for public

school purposes, the county Board of Education of the county or the City Board of Education of any city in such county, as the case may be, may issue and sell interest bearing warrants with principal and interest to be paid from the revenue arising from said special tax levy and allocated to the Board of Education issuing and selling the warrants and securing the loan, and such board shall have the full authority and power to pledge all or any part of the revenue allocated to such Board of Education under and by virtue of the local act of the Legislature levying the tax. . . . Said warrants shall not be a general obligagation of the county or city, but shall be payable solely from the revenue arising from said special taxes and allocated to the issuing board under such local act of the Legislature."

Also, Act No. 528 provides:

"In any county in which a special license or privilege tax or excise tax may now or hereafter be levied by local act of the Legislature of Alabama, the County Board of Education of the county or the City Board of Education of any city in the county, as the case may be, may sell and issue interest bearing warrants the principal of and the interest on which shall be payable solely from that portion of the proceeds from such tax which may be apportioned and paid to such board of education. . . . Said warrants shall not be general obligations of the issuing board of education but shall be payable solely from the limited source herein specified."

Therefore, from all of the above provisions, warrants issued by the Escambia County Hospital Board, Escambia County Alabama Board of Education or the City of Brewton Alabama Board of Education are not general obligations irrespective of whether the character of the issuing authority is that of a political subdivision.

I hope this sufficiently answers your inquiries.

Very truly yours,

JOHN PATTERSON
Attorney General

July 9, 1958

Hon. Reuben H. Wright
President
Alabama Circuit Judges Association
Tuscaloosa, Alabama

Appropriations—Costs and Fees—Attorneys—Statutes.

1. Although the Code or a general act provides for the payment of attorneys' fees out of the general fund of the State Treasury in capital cases where defendant is indigent, a subsequent general appropriation act providing a specific amount for the payment of such fees and an expression of the Legislature that said specific amount shall be maximum is controlling over a continuing appropriation in said Code or general act.

2. A general appropriation act containing a specific amount for the payment of attorneys' fees in capital cases where defendant is indigent, and an estimated amount for court costs, should be interpreted to limit the payment of said attorneys' fees to the amount provided and said fees cannot be paid from the appropriation for court costs.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 20, 1958, is as follows:

"Many lawyers have been appointed by the Circuit Judges of Alabama to represent indigent defendants in capital felony cases and these lawyers are clamoring for these fees. Hon. John Graves, Controller, has held up payment of these fees and these lawyers have appealed to the Circuit Judges for their money.

"These fees certainly are Court costs in a proper sense and we hope that you will so advise Hon. John Graves, Controller, so that he will pay these fees."

In my opinion, the fees of attorneys referred to in your inquiry cannot be paid as court costs, but must be paid out of the appropriation made by the Legislature for payment of attorneys' fees in indigent capital cases as provided for in the General Appropriation Act (Act No. 626, General Acts 1957, pages 897, 916, Item F, Misc. (3), and only if such appropriation is sufficient.

Title 15, Section 318, Code of Alabama 1940, as amended by Act No. 176, General Acts 1947, page 61, provides for the appointment of counsel in cases where the defendant is charged with a capital offense and is indigent.

Act No. 176, supra, allows the trial judge to fix a fee of not less than fifty dollars nor more than one hundred dollars "to be paid on the warrant of the State Comptroller from the general fund in the State Treasury." When the trial judge certifies to the State Comptroller that such appointed counsel have performed the services required of them and certifies the amount of the fee, Act No. 176, supra, further provides that "a warrant shall be drawn in favor of the attorney or attorneys upon the general fund of the Treasury of the State of Alabama in payment therefor."

In my opinion, Title 15, Section 318, as amended by Act No. 176, supra, contains a continuing appropriation out of the general fund of the State of Alabama for payment of said attorneys' fees and it would be unnecessary to include a specific appropriation in the General Appropriation Act in order to enable the State Comptroller to issue his warrant for the payment of said fees drawn upon the general fund. However, the current General Appropriation Act (Act No. 626, General Acts 1957, pages 897, 916, Item F, Misc. (3)) provides as follows:

> "For payment of attorneys' fees in indigent capital cases (as provided in Act No. 176, 1947 Acts, page 61) . . . . . 20,000.00."

The current General Appropriation Act also provides in Section 4 thereof that "except as may be herein otherwise provided the amounts herein specifically appropriated shall be in lieu of the amounts heretofore provided or appropriated by law for such purposes. That the amounts herein appropriated are the maximum amounts to be expended for the purposes herein designated and that in no event shall the maximum expenditure provided for items of expense extend the amount allocated herein except for these appropriations designated as 'estimated,' and all appropriations herein made . . . are and shall be subject to the terms, conditions, provisions and limitations of Title 55, Chapter 4, Article 3, Code of Alabama 1940."

It is to be noted, therefore, that for the term of the current General Appropriation Act, the Legislature has specifically provided the amount of $20,000.00 per year for the payment of attorneys appointed to defend indigent defendants in capital cases, and it is specifically provided that this amount shall be the maximum amount available.

In my opinion the case of **Riggs v. Brewer,** 64 Ala. 282, is controlling here. There it was held that a subsequent General Appropriation Act superseded a general statute fixing the salary of the Marshal of the Supreme Court of Alabama when the subsequent General Appropriation Act showed

an intent on the part of the Legislature to repeal during the life of said appropriation act the salary fixed by general statute. See also, **Reynolds v. Taylor**, 43 Ala. 420, and **Eagerton v. Graves**, 252 Ala. 326, 40 So. 2d 417.

I am informed that the present $20,000.00 appropriation for the fiscal year ending September 30, 1958, is exhausted and that neither the emergency fund (Title 55, Section 105, Code of Alabama 1940) nor the Governor's emergency fund (Item III, Executive A(2) of the General Appropriation Act, supra) contains sufficient funds for supplementing the appropriation for payment of attorneys' fees in indigent capital cases (Item F, Misc. (3), General Appropriation Act, supra). It appears, therefore, that such fees cannot be paid.

It is true that the current General Appropriation Act, supra, in Item F, Misc. (5), makes an appropriation as follows:

> "For court costs to be paid by the State of Alabama not otherwise provided for, estimated . . . . . 5,000.00."

It is apparent that such appropriation for court costs would not be limited to $5,000.00 under the provisions of Section 4 of the General Appropriation Act, supra, since it is an estimated appropriation. It is my view, however, that since attorneys' fees are specifically provided for in a limited appropriation, separate from the appropriation for court costs, that said attorneys' fees must be paid from said limited appropriation and not from the appropriation for court costs.

Very truly yours,

JOHN PATTERSON
Attorney General

July 10, 1958

Hon. Carlos B. Gates
Coroner, Autauga County
401 East Second Street
Prattville, Alabama

Coroners—Solicitors—Inquests—Bodies.

1. A coroner's jury may be summoned by order of a solicitor or judge of a court of record after the coroner has presented affidavits of witnesses to one of said officers.

2. An autopsy may be ordered by the coroner during an inquest by a coroner's jury when a physician cannot determine cause of death from an external post mortem examination.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 23, 1958, is as follows:

"As Coroner of Autauga County, Alabama, I am writing to you in an attempt to secure some legal information which I am sure will be of utmost importance to me in the future.

"I have been informed that the Coroner must always obtain permission from the Circuit Solicitor to authorize an autopsy on a body when foul play is evident and members of the immediate family are too emotionally disturbed to sign papers of authority to proceed with an autopsy. Is this information correct in regards to securing this authority from the Circuit Solicitor? If so, whom must I call upon in the absence of the Circuit Solicitor?"

Certain Code sections provide an answer to your inquiry. Title 15, Sections 76, 77, 78, Code of Alabama 1940, provides as follows:

"§ 76. Process of holding coroner's inquest; jury of inquest summoned by coroner.—When a coroner has been informed that a person has been killed, or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof, and submit the same to a judge of a court of record or a solicitor; and if, upon such preliminary inquiry the judge or solicitor is satisfied from the evidence that there is reasonable ground for believing that such death has been occasioned by the act of another, by unlawful means, he must direct the coroner to forthwith summon a jury of six discreet householders of the county to appear before him forthwith at a specified place and inquire into the cause of such death, but no person shall be liable to serve as a juror more than one time during any one year, and no person shall be paid compensation for services as a juror on more than one inquest during any one year."

"§ 77. Oath of jury.—When five or more of the jurors appear, they must be sworn to inquire who the person was, and when, where, and by what means he came to his death; and to render a true verdict there-

on, according to the evidence offered them, or arising from the inspection of the body."

"§ 78. Witnesses and surgeons summoned.—The coroner may issue subpoenas for witnesses returnable forthwith, or at such time and place as he may appoint; he must summon and examine as a witness any person who in his opinion or that of any of the jury, has any knowledge of the facts; he may also summon as a witness a surgeon or physician who must, in the presence of the jury, inspect the body, and give a professional opinion as to the cause of death; when a coroner has been informed that a person is dead in the county, and that said person died without being attended or examined by a legally qualified physician, the coroner shall forthwith proceed to the place where the dead person is lying, and examine the dead body to ascertain the cause of death, and report same in the same manner as inquests are reported; when the coroner is unable to determine the cause of death, he may summon any physician or surgeon, who shall make an external post-mortem examination of the dead body, and report his opinion of the cause of death to the coroner in writing; if the surgeon or physician is unable to determine the cause of death from an external post-mortem examination, and the coroner has reasonable cause to believe that deceased came to his or her death by unlawful means, the coroner may in such cases order any physician or surgeon to perform an autopsy or internal examination on the dead body, and report the findings of said autopsy to the coroner in writing."

You will note that when the coroner discovers the death of a person by unlawful means, he makes inquiry of the facts and presents certain sworn statements either to (1) the solicitor or (2) the judge of the court of record. The judge or the solicitor to whom such report is submitted then may direct the summoning of a coroner's jury to inquire into the cause of death. It is further to be noted that Section 78, supra, provides that the coroner may summon a physician and if the physician is unable to determine the cause of death from an external examination of the body, the coroner may order the physician to perform an autopsy.

In other words, the coroner presents, after making the inquiry, certain written affidavits to either a solicitor or the judge of a court of record. Either one of these officials may order an inquest to be made and a jury to be summoned. Thereafter the coroner may order the physician who is summoned to perform an autopsy if it appears that the cause of death cannot be ascertained except by such methods.

The consent of the solicitor is not necessarily involved when the coroner orders an autopsy under the above quoted statutes. The above quoted statutes simply require the coroner to obtain the consent or approval of the solicitor or a judge of a court of record to summon a coroner's

jury. Thereafter the matter of ordering an autopsy becomes the prerogative of the coroner without obtaining any further consent of anyone.

Very truly yours,

JOHN PATTERSON
Attorney General

July 11, 1958

Honorable J. A. Logue
Judge of Probate, Houston County
Dothan, Alabama

Counties—Gasoline and Gasoline Tax—Exemptions.

1. Excise tax levied on dealers in lubricating oils under Title 51, Sections 630, et seq., Code of Alabama 1940, as amended, is a tax on the dealer or distributor and not the consumer.

2. Counties not exempt from paying amount of said tax as part of purchase price where purchase is made from dealer or distributor in this State.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of June 10, 1958, concerning the excise tax levied on dealers in lubricating oils under the provisions of Title 51, Sections 630 et seq., Code of Alabama 1940, as amended, is as follows:

"The Houston County Road and Bridge Department, in purchasing lubrication oil for the use of the County in the past, has been charged two cents per gallon tax on said oil. This tax is a State Tax and we feel that the County should not be required to pay same.

"Please advise if the Houston County Road and Bridge Department may be exempt from payment of this two cents per gallon lubrication tax."

Additional information which I have obtained from your office is to the effect that the Houston County Road and Bridge Department purchases

all of its lubricating oil from local distributors in Houston County, Alabama.

Section 631 of Title 51, supra, is the levying Section, and expressly levies the tax on the "distributor, manufacturer, retail dealer or storer." The incident of the tax is upon the "selling, distribution or withdrawal from storage in this State for any use, lubricating oil."

It is, of course, recognized that the county as a political subdivision of the State enjoys an immunity from taxation, unless the Legislature has expressly provided that the county be subject to a certain tax. **Huntsville v. Madison County,** 166 Ala. 389, 52 So. 326; **State v. City of Montgomery, 228** Ala. 93, 191 So. 856.

Where the Legislature expressly provides that the county is to be subject to the tax, the immunity is said to be waived. However, that does not appear to have been done as to this particular tax. Quarterly Report of the Attorney General, Volume 14, page 175.

The question then seems well settled that if the tax is actually against the county, then the county would be immune from paying this particular tax, as the taxing statute does not expressly bring the county within its purview or provide that the county is to be taxed. The question to be answered then is whether or not the tax is levied under the circumstances against the county.

In cases where a county buys lubricating oils from distributors located within the State, this question as relating to the taxing statute under consideration has already been answered by this office in an official opinion reported in Quarterly Report of the Attorney General, Volume 14, page 175.

In this respect the writer on page 176 of this opinion asserted as follows:

> "However, if the county board of education buys lubricating oil in this state from a 'retail dealer' or 'distributor,' the retail dealer or distributor must pay the tax. In such case the seller and not the buyer pays the tax. He may sell his lubricating oil at any price he sees fit. The State is not interested in that. The tax can be paid to the State only." (Emphasis Supplied)

In other words, and in your case, the county as the purchaser of the oil from a distributor in Alabama is not the taxpayer. The matter then becomes a principle of economics and not of taxation. The distributor (the seller) pays the tax, and merely passes the amount thereof down to the county by raising the price of the oil.

This principle is not a new one for it was recognized in **State v. City of Montgomery, supra; Orange State Oil Co. v. Amos,** 100 Fla. 844, 130 So.

707; State of Alabama v. King & Boozier, 314 U. S. 1, 62 Supreme Court 43, and in a number of other cases where, as a practical matter, the same question was involved, and now seems well settled.

In Quarterly Report of the Attorney General, Volume 14, page 175, and on page 177, the writer concluded this opinion, as follows:

> "However, where lubricating oil is purchased from a local retail dealer, the county board of education cannot object because the amount of the tax is included in the purchase price by such retail dealer or distributor who is, in tact, the taxpayer. Cf. Opinion Biennial Report of Attorney General, 1928-30, page 547. Also opinion of the Attorney General Vol. VIII, Office Ed., page 283, dated February 18, 1932, and opinion of the Attorney General, Vol. IX, Office Ed., page 23, dated March 2, 1932." (Emphasis Supplied)

We believe this ruling to still be applicable and correct. The taxing statute itself makes the distributor or dealer liable for the tax when he sells in this State, or when he withdraws the lubricating oil from storage in this State for sale or for any other use. The distributor or dealer under such circumstances is the taxpayer. Thus, the fact that the county ultimately absorbs the lubricating oil tax by paying a higher price for the oil would not relieve the distributor as the seller and the taxpayer from paying the tax, or the county from paying the higher price for the gasoline, if the distributor passes the amount of the tax down to county as the purchaser in this State.

Very truly yours,

JOHN PATTERSON
Attorney General

July 15, 1958

Hon. J. B. Henley
Member, Board of Revenue
Escambia County
Brewton, Alabama

Counties—Gasoline and Gasoline Tax—Gasoline Fund—Roads and Bridges.

1. A county may use its share of the proceeds of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73,

to purchase two-way radios and radio equipment to be used in the construction, maintenance and supervision of the public roads and bridges in the county.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of July 11, 1958, is as follows:

"Three of the four districts of this County have purchased two-way radios and radio equipment from funds held in the Asphalt Fund and the Engineering Fund, which money originally came from the gas tax revenue. These radios are located in the office or equipment shed in each district, in the foreman's truck and in the Asphalt Plant engineer's truck. My question is, does the Board of Revenue have the authority to make these purchases out of the funds mentioned above?"

Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, provides that the proceeds of the gasoline tax to which your request refers distributed to the counties in this State, "shall be used exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties." Quarterly Report of Attorney General, Vol. 89, p. 16.

Since the facts set out in the above-quoted portion of your request indicate that the two-way radios and radio equipment which your county has purchased are used in the construction, maintenance and supervision of the public roads and bridges in your county, I am of the opinion that your Board of Revenue was authorized to purchase said equipment with gasoline tax revenues. See opinion to Honorable Guy D. Roberts, Chairman, Board of Revenue and Control, Morgan County, under date of August 5, 1957.

Very truly yours,

JOHN PATTERSON
Attorney General

July 22, 1958

Dr. J. S. Snoddy
Commissioner
Department of Pensions and Security
C A P I T O L

Appropriations—Pensions and Security, Department of—Words and Phrases—Attorneys—Salaries.

1. An attorney's fee and an award made for salaries of personnel are expenditures for administrative purposes within the meaning of the General Appropriation Act (Act No. 626, General and Local Acts 1957, page 897).

2. Although expenses for administrative purposes may be incurred by the Department of Pensions and Security prior to the General Appropriation Act which limits such expenses, if such expenses are ascertained during the effective period of the current appropriation act, said expenses are limited to the amount set in such act.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 16, 1958, is as follows:

"On January 2, 1951, the State Board of Public Welfare requested that this department pay to the law firm of Capell and Howard the sum of $2,000 for legal services rendered to the department. This indebtedness was paid by warrant issued on January 8, 1951.

"On February 18, 1955, the State Board of Adjustment awarded Bill Dorrough, a former commissioner, the sum of $1,555.57 for salary purposes, and directed that said award be charged against this department. This indebtedness was paid by warrant issued on February 24, 1955.

"At the time these warrants were issued, it was contemplated that these accounts would be payable, as are other accounts of this department, on a matching basis, with a large portion coming from federal funds. The payments were charged against matched funds, but later the federal authorities took exception to these expenditures from federal funds, and now require a repayment of all the federal money used for these two purposes.

"Furthermore, at the time these warrants were issued there was no limitation upon the amount of state money which this department could spend for administrative purposes. In other words, we could have paid these amounts, totally out of state funds when they accrued without hampering the payment of any other account for administrative purposes. Now, however, there is a limitation of $2,200,000 upon state funds which may be used for administrative purposes during the current fiscal year by virtue of Act No. 626, Acts of Alabama, 1957.

"Your opinion is requested as to whether Act No. 626 requires this department to treat funds repaid to the federal government for the reasons outlined above as funds used for administrative purposes during the current fiscal year, and therefore chargeable as a portion of the $2,200,000 which this department may spend for administrative purposes during the current fiscal year, or whether the department might treat such payments as being properly chargeable to this department over and above the stated limitation since they are for purposes of administering the program in prior years when no limitation was applicable."

It is my view that the two items referred to in your inquiry must be paid within the limitations of $2,200,000 for administrative purposes as required by Act No. 626, General and Local Acts 1957, pages 897, 934, Item G(22) (the General Appropriation Act of 1957, approved September 18, 1957).

The General Appropriation Act in Item III(26) makes an appropriation to the Department of Pensions and Security "for the support, maintenance and operation of the functions of Pensions and Security . . . . . 4,535,000.00." This appropriation, of course, is made from the General Fund.

The General Appropriation Act, supra, page 934, provides another appropriation "for other salaries and expenses incident to the operation and management of the Department of all welfare purposes as provided by law, there is hereby, in addition to the amounts set out in Item III A(26) all Federal, State, County and Municipal funds made available therefor, provided that not more than the sum of two million two hundred thousand ($2,200,000.00) of the State funds made available for welfare purposes may be used for administrative purposes of the Department . . ."

It is my opinion that the two items mentioned in your inquiry, which consists of an attorney's fee and a part of a salary, are for administrative purposes. It further appears that these expenses accrued prior to the current General Appropiation Act and that the department is now required to reimburse the Federal agency for that part of the Federal matching included in those items. It is also clear, however, that the fact that Federal matching was not permissible was ascertained during the period covered by the present or current General Appropriation Act.

It is my opinion that the Legislature intended to limit administrative expenses under the terms of the above quoted provision of this act. It

is further my view that this limitation of $2,200,000 applies to those administrative expenses that are ascertained during the period covered by the current Appropriation Act even though said expenses may have accrued at a prior time.

You are advised, therefore, that the item of $2,000 for legal services and $1,555.57 for salaries must be paid within the limitation of the $2,200,000.

Very truly yours,

JOHN PATTERSON
Attorney General

July 23, 1958

Hon. Walter D. Ritch
Chairman
Marion County Board of Revenue
Hamilton, Alabama

Counties—Municipalities—Road and Bridge Fund—Streets.

1. A municipality may not enter into a contract with a county which provides that the county will construct, for an adequate consideration, streets within the corporate limits of a municipality if the equipment and supplies, to be used in the construction of such streets, were purchased with moneys from the County's Road and Bridge Fund.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of July 9, 1958, is as follows:

"The Town of Hamilton desires to enter into a contract with Marion County Board of Revenue whereby it will pay the Board the going contract price for constructing paved streets within the Town.

"The Board members wanted me to write your office to make sure that such an arrangement would be legal, before undertaking any project."

I assume that the work, which your county contemplates performing on the streets within the corporate limits of the Town of Hamilton, will involve the use of county road machinery, labor materials and supplies purchased, at least in part, with moneys from your county Road and Bridge Fund.

Your county Road and Bridge Fund consists of the proceeds of the special taxes authorized by the Constitution of Alabama 1901, Section 215, the county's share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, and may also consist of moneys transferred into such fund from the county's general fund.

A county's funds derived from the proceeds of the special taxes authorized by Section 215, supra, and a county's share of the gasoline tax levied by Section 647, as amended, supra, may not be used to construct or maintain streets within a municipality, either directly or by use of county forces, equipment or material. Quarterly Reports of Attorney General, Vol. 89, p. 16 and Vol. 90, p. 21. The provisions of Title 23, Section 47, Code of Alabama 1940, place this same limitation on the expenditure of funds which have been transferred from the county's general fund to its Road and Bridge Fund. Quarterly Report of Attorney General, Vol. 90, p. 21, supra.

In the case of **Town of Clanton v. Chilton County,** 205 Ala. 103, 87 So. 345, the Supreme Court of Alabama had before it a situation similar to the one presented by your request. That case involved an action on a contract entered into by and between Chilton County and the Town of Clanton. Pursuant to said contract Chilton County had, through the county's road contractor, improved a street in the Town of Clanton and had paid for such improvement by issuing warrants against its Road and Bridge Fund which consisted of moneys derived from the special levy authorized by Section 215, supra. The Town of Clanton under the contract had agreed to reimburse Chilton County for the funds expended in making said improvement. See Quarterly Report of Attorney General, Vol. 90, p. 7. The opinion of the court said in part:

> "In view of the restrictive provisions of section 215 of the Constitution, the county authorities were forbidden to devote or to apply, directly or indirectly, the product of such special levy to the repair, construction, or improvement of any street in the town of Clanton; funds so derived or to be collected being restricted to use on, or to improve, public roads of the county. City of Demopolis v. Marengo County, 195 Ala. 214, 70 South. 275; County of Montgomery v. City of Montgomery, 190 Ala. 366, 67 South. 311, collecting earlier decisions. **Hence any effort of the county of Chilton to so engage with the town of Clanton (if so) was wholly void, impossible of valid consummation. (Emphasis supplied.)**

As pointed out above the same limitation on the expenditure of funds derived from the special taxes authorized by Section 215, supra, has been

placed on the expenditure of a county's share of the gasoline tax levied by Section 647, as amended, supra, and the expenditure of other funds transferred into a county's Road and Bridge Fund from its general fund.

Premises considered, I am of the opinion that the Marion County Board of Revenue is not authorized to enter into a contract with the Town of Hamilton for the purpose to which your request refers; and that, if such a contract is entered into, it will be void.

Very truly yours,

JOHN PATTERSON
Attorney General

July 30, 1958

Hon. W. H. Quillin, Judge
Law and Equity Court of Franklin County
Russellville, Alabama

Juveniles—Juvenile Court—Motor Vehicles—Highways and Highway Departments.

Cases of children under sixteen years of age charged with violation of traffic laws should be tried in Juvenile Court, and such cases transferred to said court when same are in other courts.

Opinion by Assistant Attorney General Prestwood.

Dear Sir:

Your request for an official opinion bearing date of June 30, 1958 is as follows:

"I have in mind Code of Alabama 1940, Title 7, Sec. 363. If a highway patrolman arrests a child under the age of sixteen years on a charge of driving a motor vehicle upon a highway in his presence without a license to do so and carries such child before a justice of the peace, inferior court, law and equity or other court having final jurisdiction in traffic cases for trial and punishment, if it is made known to such court that the child is under the age of sixteen years should such court proceed to try such child or entertain a plea of guilty or should such court transfer the case to the juvenile court of the county in order that such child might be tried or dealt with in the juvenile court?

"Should children under the age of sixteen years charged with traffic violations be tried in the criminal courts or should the cases against such children be transferred by the criminal court to the juvenile court of the county?

"Please let me have your opinion."

While you refer to Sections 363 of Title 7, I am sure you intended to refer to Title 13, Section 363, Code of Alabama 1940 which provides in part as follows:

"Whenever a child under sixteen years of age is brought before a magistrate of any court in the county other than the juvenile court, charged with any offense, such magistrate or court shall forthwith, by proper order, transfer the case to the juvenile court of the county."

Title 13, Section 350, Code of Alabama 1940 defines a "delinquent child" as one who "violates any penal law of the United States or of this state, or any regulation, ordinance or law of any city, town or municipality, or who commits any offense or act for which an adult could be prosecuted in a method partaking of the nature of a criminal action or proceeding . . . " The juvenile court has exclusive jurisdiction over delinquent children. See Title 13, Section 351, Code of Alabama 1940.

Title 36, Section 55, Code of 1940, as amended by Act No. 517, General Acts 1949, p. 754, provides in part as follows:

"Any person under the age of sixteen years who shall drive or operate any motor vehicle upon the public highways of this state, shall be guilty of a misdemeanor, and shall be dealt with as provided by the juvenile laws of this state."

In view of these statutes I can see no alternative but to advise you that children under the age of sixteen years who are brought before any magistrate other than the juvenile court judge, charged with traffic violations, must be transferred to the juvenile court.

Sincerely,

JOHN PATTERSON
Attorney General

August 6, 1958

Honorable R. S. Ward
Judge of Probate
Geneva County
Geneva, Alabama

Elections—Poll Tax and Poll Lists—Counties—Judges of Probate —Publication.

1. The cost of publication in newspapers of voter lists under the provisions of Title 17, Section 38, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331, is a legal and proper expenditure of the county.

2. The rate to be charged and paid for such publication in tabular form in newspapers shall not exceed the nationally published rate, as specified in Title 7, Section 718, Code of Alabama 1940, as amended by Act No. 793, General and Local Acts 1953, page 1086.

Opinion by Assistant Attorney General Dillon.

Dear Sir:

Your request for an official opinion, bearing date of June 18, 1958, is as follows:

"I am writing this letter to request your opinion on the question of what a weekly newspaper published at Geneva can legally charge Geneva County for publishing in one copy of its paper a Poll List of voters of the County.

"I call your attention to Title 7, Section 718, as amended, and in particular to Title 7, Sub-Section 718 (2) under the heading 'Rates to be charged.'

"The Geneva County Reaper recently published our Poll List and for this service they have submitted to us a bill for 65 cents per inch, which I assume is the nationally published rate.

"The County wants to pay whatever amount is legal and proper, and we request your opinion as to whether we can legally pay the amount stated above, or whether the owner of the paper is limited to charging the County not more than two cents per word for this service."

The costs of publishing, in newspapers, lists of qualified voters, as required by Title 17, Section 38, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331, is a proper charge against the general fund of the county. Biennial Report of Attorney General, 1928-30, page 916.

The answer to your specific question is covered within the provisions of Title 7, Section 718, Code of Alabama 1940, as amended by Sections 1 and 2, Act No. 793, General and Local Acts 1953, page 1086, which provides as follows:

"Section 1. The rates herein established shall apply to any and all legal notices, advertisements, publications, statements, or other matter of whatever kind or character required by the Constitution of Alabama, or by general, local or special law or rules or orders of courts to be published in newspapers in this State whether the agency required to cause the publication to be made is an individual, officer, municipality, county, the state, governmental subdivision, or any other legal entity; provided that rates herein established shall not apply when a local law prescribes a different rate, in which event said local law shall be applicable.

"Section 2. Newspapers of this State shall not charge, nor shall any agency required to cause publication to be made pay, more than two cents a word for the first insertion and one and one-half cents a word for each subsequent insertion; provided that the current published commercial rate may be contracted for when the publication is made in a daily newspaper. When any matter or material is required to be published in tabular form, the rate to be charged and paid shall not exceed the nationally published rate."

This act is applicable to the publication under consideration. Quarterly Report of Attorney General, Vol. 74, pages 30 and 68.

It is my opinion, that if the legal notices are published in tabular form, the basis for computing the rate to be paid to newspapers is altered. Section 2 of Act No. 793, supra, provides, " . . . When any matter or material is required to be published in tabular form, the rate to be charged and paid shall not exceed the nationally published rate." Under this Section the rate to be charged is flexible depending upon the nationally published rate. In negotiating contracts for publication in tabular form, the rate to be charged by the newspapers and paid by the county will be limited to the nationally published rate at the time of the execution of the contract.

Tabular form, as defined in the dictionary, is described as being "set up in columns and reading across." It is defined as "arranged or entered in a table or tabulated form." It follows that the poll lists published in newspapers fall within the category of tabular form. It is, therefore, my opinion, that poll lists published in a county newspaper would presently constitute publication in tabular form, and payment therefor may be made in an

amount not to exceed the nationally published rate, and is not limited to two cents (2c) per word. Title 7, Section 718, Code of Alabama 1940, as amended by Act No. 793, General and Local Acts 1953, page 1086.

I am unable to ascertain the "nationally published rate" for publishing legal notices in tabular form in newspapers. No doubt, this rate is known or ascertainable by newspaper publishers.

Very truly yours,

JOHN PATTERSON
Attorney General

August 8, 1958

Honorable Arthur Joe Grant
Commissioner of Revenue
Department of Revenue
C A P I T O L

Taxation—Cigars & Cigarettes—Sales.

Certain sales promotion schemes held not a violation of Act No. 805, General & Local Acts 1951, p. 1402 known as "The Unfair Cigarette Sales Act."

Opinion by Assistant Attorney General Livingston.

Dear Sir:

The request from your predecessor for an official opinion bearing date of May 2, 1958 is as follows:

"Cigarette manufacturers are putting on sales promotion programs in Alabama in the following manner:

"1. Some manufacturers are using a program whereby they will set up a display in one or more stores in a town and give away various articles with the purchase of each carton of cigarettes; articles such as cigarette lighters, ladies hose, ladies earrings, etc. All such merchandise is paid for by the manufacturer. The retail merchant pays no part of the cost of such articles and also, collects the proper amount for the sale of a carton of cigarettes.

"2. Another method is that they will arrange with the operator of the store to give away a carton of six soft drinks or other items from the store with the purchase of each carton of cigarettes and the manufacturer pays the merchant for the soft drinks or other items and any tax that might be involved. The merchant collects the proper amount for the sale of the carton of cigarettes.

"3. Other manufacturers will attach to each carton of cigarettes one or two individual packages of cigarettes with no cost to the merchant for the extra packages. The merchant collects the proper amount for the carton of cigarettes which he sells.

"4. The manufacturer's representatives go into a store and contact the cigarette smoker requesting him to light a cigarette of a certain brand and try it and if there appears to be a favorable reaction to the taste of a cigarette, then the salesman suggests to the prospective customer that he purchase a carton of that particular brand and he would give him two packages free. The merchant collects the proper amount for the carton of cigarettes.

"5. Other manufacturers display their brands of cigarettes and give a plastic cigarette case with the purchase of each two packages of cigarettes. The cost of the plastic case is borne by the manufacturer.

"While the above enumerated articles are the ones which we have knowledge of, there might be various other articles that could be similarly used in their sales promotion programs. You will note that in all of the above cases, the retail merchant in no way bears the cost of the free merchandise given with the purchase of the cigarettes.

"It is requested that you render an opinion as to whether or not the above procedures of sales promotion by the manufacturer of cigarettes is in violation of the provisions of Act No. 805, General Acts 1951, Volume 2, page 1402."

Based on the facts set forth in your inquiry, it is my opinion that none of the sales promotion schemes referred to is in violation of the provisions of Act No. 805, General & Local Acts 1951, page 1402, known as "The Unfair Cigarette Sales Act."

The pertinent sections of Act No. 805, supra, are Section III (a) and Section V. Section III (a) provides as follows:

"It shall be unlawful for any wholesaler or retailer, with intent to injure competitors, destroy or substantially lessen competition, to advertise, offer to sell, or sell at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer as the case may be. Any wholesaler or retailer who shall violate the provisions of this Section shall

be guilty of a misdemeanor and be punishable by fine of not more than $500.00."

It is clear that there is no violation of Section III (a), supra. As stated, the merchant collects the proper amount for the cigarettes which he sells. I understand this to mean that the amount charged is not less than the cost insofar as the retailer or wholesaler is concerned.

Section V, supra, provides as follows:

"In all advertisements, offers for sale or sales involving two or more items, at least one of which is cigarettes, at a combined price and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever, (whether it be coupons or otherwise) the retailer's or wholesaler's selling price shall not be below the 'cost to the retailer' or the 'cost to wholesaler', respectively, of all articles, products, commodities and concessions included in such transactions."

There appears to be no violation of Section V since the concessions which are given in connection with the sale of cigarettes are concessions on the part of the manufacturer, not of the retailer or wholesaler. According to the facts stated, there is no "combined" selling price since items given gratis with sales of cigarettes are supplied by the manufacturer at no cost to the retailer or wholesaler. The price charged by the merchant is not affected by the concessions given by the manufacturer.

Very truly yours,

JOHN PATTERSON
Attorney General

August 13, 1958

Honorable E. G. Thomas, Sr.
Superintendent
Jackson County Schools
Scottsboro, Alabama

Schools—County Boards of Education.

1. A teacherage built on school property owned by the State of Alabama, by funds raised by the people in the community, is State property under the control of the county board of

education, which is the proper authority to fix and collect rent on the teacherage.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of August 9, 1958, is as follows:

"The Jackson County Board of Education requests your opinion concerning a teacherage at Macedonia school in Jackson County. The teacherage is built on land deeded to the State of Alabama. It is on the regular school campus. Some of the patrons of the school say that the people in the community built the teacherage and that the county board of education did not pay any on it. These same people also say that no teacher or principal of the school has ever paid any rent on the teacherage. However, the following is a resolution passed by the Jackson County Board of Education August 23, 1941: 'Mr. Brewster made motion that the teacherage at Macedonia be rented to W. G. Dean and Elmer Carter for $10.00 per month for length of school term, and that this rent be paid to the Jackson County Board of Education, and they in turn pay it to the Patrick Lumber Company for materials used in the building. Mr. Butler seconded the motion which carried.' Mr. Dean was principal of the school at the time this resolution was approved and Mr. Elmer Carter was a teacher in the school.

"The present principal, Mr. Agee Strickland has never paid any rent even though he has been living in the teacherage for six years. The present members of the board of education did not know about any arrangements having been made with the trustees of the school to the effect that Mr. Strickland was not to pay any rent. Mr. Strickland had an understanding with the trustees that he was to get the rent free. At the regular board meeting June 28, 1958, the board set up a schedule of rent for the various teacherages in the county, there are seven in the county and all of the principals living in the other six having been paying rent all along. When Mr. Strickland, the principal at Macedonia, was notified that he was to pay rent, he with a group of the patrons from Macedonia school came before the board and questioned the board's right to fix and collect rent on the teacherage at Macedonia, because of the fact that the people in the community built the teacherage. So the board would like to get an opinion from your office as to whether or not it has the right to fix and collect rent on this teacherage."

It is my opinion that the Board of Education has the right to fix and collect rent on the teacherage. Even if the people in the community built

the teacherage, it is nevertheless, from the facts given, State property and under the control of the Board of Education.

Title 52, Section 71, Code of Alabama 1940 provides the following:

"All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."

Under the provisions of this section, it has been ruled by this office that title to a teacher's home, built with the proceeds from box suppers, donations, etc., vests in the county board of education. Biennial Report of Attorney General 1928-30, page 121. See also Quarterly Report of Attorney General, Vol. 22, page 149.

Your attention is also directed to Title 52, Section 99, Code of Alabama 1940, which is as follows:

"The county board of education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board."

Very truly yours,

JOHN PATTERSON
Attorney General

August 18, 1958

Honorable L. W. Gentry
Savings and Loan Commissioner
State Banking Department
C A P I T O L

Banks and Banking—Federal Savings and Loan Associations—State Savings and Loan Associations.

1. Federal savings and loan associations are under the sole authority and control of laws of the United States and not subject to Alabama laws in establishing or maintaining a branch office.

2. Savings and loan associations chartered by the State of Alabama are subject to State law as to establishing or maintaining branch offices.

Opinion by Assistant Attorney General Young.

Dear Sir:

Your request for an official opinion bearing date of July 25, 1958 is as follows:

"Section 247 of Title 5 of the 1940 Code of Alabama prohibits the establishment of a branch savings and loan association. In several of the counties local legislation has been enacted. This would, of course, authorize branches in some of our counties.

"We are enclosing a notice from the Federal Home Loan Bank Board of Washington, D. C., to the effect that the First Federal Savings and Loan Association of Decatur, Morgan County, Alabama has requested permission to establish a branch office in Athens, Limestone County, Alabama. Branch banks or branch savings and loan associations have not been authorized in Limestone County by the Legislature of Alabama. Therefore, we feel that this office should protest the establishment of such office. On one or two previous occasions, we have in some manner opposed or protested the establishment of such other branches and in each instance the Federal authorities have disregarded State laws and granted permission for the Federals to establish such branches as they desired. As an illustration, the First Federal Savings and Loan Association of Mobile, Alabama, has in operation two branch Associations and the Home Savings and Loan Association, which is a State chartered institution, has requested permission from this office to establish a branch in Mobile County; however, we feel that we are without authority to grant such approval to the Home Savings and Loan Association. We have so advised the Home Association that it will take a local act authorizing branch savings and loan associations in Mobile County, Alabama, before this office can legally approve such branch. In your opinion should this office disregard the provisions of Section 247 and comply with the request of the Home Savings and Loan Association of Mobile after reviewing the contents of Act No. 120 of the 1945 Regular Session of the Legislature of Alabama?

"We will appreciate your advice as to the type of protest that this office should make on the application for the establishment of a branch

> Federal in Athens, Alabama, and also, on the application of the Home Savings and Loan Association of Mobile for the establishment of a branch of the State chartered Association. We would also like to be advised why the Federal authorities can disregard observing State laws in the establishment of savings and loan associations or branches whereas, this is not true with the establishment of branches of National banks."

My reply gives consideration first only to federal savings and loan associations created, operated and supervised by the Federal Home Loan Bank Board under the authority of the "Home Owners' Loan Act of 1933," as amended. Title 12, §§1461, 1464, U.S.C.A.; 48 Stat. 128.

Federal savings and loan associations are maintained under the declared congressional purpose ". . . to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes. . . ." Title 12, §1464(a), U.S.C.A. Therefore, because of complete federalization of federal savings and loan associations pursuant to the aforementioned congressional intent and purpose, all such associations are under the sole authority and control of laws of the United States. This necessarily means immunity from any type of control or regulation by authority of a state. As held in the case of **California v. Coast Federal Savings and Loan Association**, 98 Fed. Supp. 311, the federal enactment embraces the entire field and leaves no room for legislation by the state. This is not the case with national banks. As to national banks, Congress expressly left open a field for state regulation and the application of state laws; but as to federal savings and loan associations, Congress made

> ". . . plenary, preemptive, delegation to the Board (Federal Home Loan Bank Board) to organize, incorporate, supervise and regulate, leaving no field for state supervision." California v. Coast Federal Savings and Loan Association, supra. (Parenthesis supplied.)

Therefore it follows, whether branch offices of federal savings and loan associations may be established and operated is a question addressed solely to the Federal Home Loan Bank Board. And I might add further that this question has been answered in the affirmative by the following cases: **First National Bank of McKeesport v. First Federal Savings and Loan Association of Homestead**, 225 Fed. Supp. 33, and **United States ex rel, State of Wisconsin v. First Federal Savings and Loan Association**, 151 Fed. Supp. 690.

Turning next to savings and loan associations chartered by the State of Alabama pursuant to the provisions of Title 5, Chapter 11, Code of Alabama 1940, it cannot be questioned that all such state chartered savings and loan associations derive their sole existence under authority of Title 5, Chapter 12, supra, and are, therefore, subject to the restrictions and

limitations contained therein. In clear and unambiguous language Title 5, §247, supra, prohibits any such association from establishing or maintaining a branch office either in the municipality in which it is located or at locations outside of such municipality unless, as you note in your letter, there has been enacted applicable local legislation permitting the establishment of branch offices.

Therefore, you, as the duly and legally appointed commissioner administering the savings and loan bureau of the Department of Commerce of the State of Alabama, exercising general supervision over all associations and corporations subject to the provisions of the aforementioned enactments, cannot disregard the prohibition of §247 supra, and as a result cannot comply with the requests of the Home Savings and Loan Association of Mobile, Alabama.

Trusting the foregoing sufficiently answers the questions contained in your letter of instant concern, I remain

Very truly yours,

JOHN PATTERSON
Attorney General

August 21, 1958

Hon. Phil M. Lightfoot
Mayor, City of Tuskegee
Tuskegee, Alabama

Municipalities—Eminent Domain.

1. A municipal corporation has no inherent power of eminent domain and can exercise such power only when expressly authorized by the legislature.

2. A municipal corporation does not have the power to condemn land for use of industry under the Wallace Act (Act No. 756, Acts of Alabama, Regular Session 1951, page 1307, Approved Sept. 6, 1951).

Opinion by Assisant Attorney General Younger.

Dear Sir:

Your request for an official opinion bearing date of August 12, 1958 is as follows:

"We respectfully request your opinion as to right of condemnation of a municipality for the use of industry under the Wallace Act or any other existing law."

In answer to your inquiry it is my opinion that a municipality does not have the power to condemn land for use of industry under the Wallace Act (Act No. 756, Acts of Alabama, Regular Session 1951, page 1307, Approved Sept. 6, 1951).

Section three of the Wallace Act empowers a municipality to "acquire, whether by construction, purchase, gift or lease" land to carry out the purpose of the Act. It should be noted that the right to acquire land by condemnation is not specifically granted in said Act.

A municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by the legislature, and statutes conferring the right must be strictly construed in favor of the landowner.—**City of Birmingham v. Brown**, 241 Ala. 203, 2 So. 2d 305; **J. Blach & Sons, Inc. v. Hawkins**, 238 Ala. 172, 189 So. 726.

The Supreme Court of Alabama in the **Brown** case construed language similar to that used in the Wallace Act to determine whether said language granted to a municipality the right to condemn property. In that case Mr. Justice Livingston stated as follows:

"As above stated, the right to acquire, which may be by purchase or gift, is not equivalent to the right to condemn. . . . The failure of the legislature to add to the r i g h t to 'acquire' or 'lease,' the right to 'condemn' evinces a legislative intent to withold the right."

Since the legislature did not specifically grant to municipalities the power to condemn property for use under the Wallace Act, in said Act, it is my opinion that municipalities do not have such power.

Very truly yours,

JOHN PATTERSON
Attorney General

August 22, 1958

Honorable Bernard A. Reynolds
Judge of Probate
Dallas County
Selma, Alabama

Highways and Highway Department—Counties—Funds.

1. Under Title 23, Section 51, Code of Alabama 1940, adjoining counties may purchase, establish, build, maintain and operate bridges or public highways, across streams, swamps, waters or marshes which form the boundary between two counties, upon such terms as may be agreed upon by the governing bodies of the adjoining counties.

2. Two adjoining counties may likewise participate in the cost of construction of a relief bridge lying wholly within one of the counties, where it is in reality a part of the main bridge across the boundary between said counties; in close proximity thereto and made necessary by the construction of the main bridge.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of August 20, 1958, is as follows:

"Dallas and Perry Counties are contemplating the construction of a bridge and relief bridge over Oakmulgee Creek, the line between Perry and Dallas Counties, this bridge to be constructed from Farm to Market FAS funds, State accrual funds and County funds, on a 50-50 percent participation by each county from the above funds.

"We respectfully request an official opinion from your office as to whether it is legal for the two counties to participate in the construction of the main bridge lying over the Creek, which is the County line, and also a relief bridge lying wholly within one of the above counties, on a 50-50 percentage, from the funds stated above."

Title 23, Section 51, Code of Alabama 1940, provides the following:

"Adjoining counties may purchase, establish, build, maintain and operate bridges and ferries, or public highways, across streams, swamps, waters or marshes which form the boundary between two counties, upon such terms as may be agreed upon by the governing bodies of the adjoining counties." (Emphasis supplied)

I assume from your letter that the necessity for the bridge and the percent of participation of each county in the costs thereof has been agreed to by the governing bodies of Dallas and Perry Counties.

It is my opinion, therefore, that it is legal, under the above circumstances, for the two counties to participate in the construction of the main bridge lying over the creek which is the county line.

I am also of the opinion that they may participate in the relief bridge, provided the relief bridge is in reality a part, so to speak, of the main bridge; in close proximity thereto and made necessary by the construction of the main bridge.

I am enclosing to you herewith, copy of an opinion of this office to Honorable Ward W. McFarland, State Highway Director, Capitol, under date of May 26, 1950, which relates to a bridge to be constructed by Dallas and Perry Counties across Oakmulgee Creek. I do not know whether the present bridge is the same one which was there under consideration, and it may be necessary to distinguish this opinion from the one there rendered. The opinion now rendered, however, covers the questions propounded in your letter of August 20, based upon the assumption as aforesaid that the two counties have agreed upon the terms relative to the construction of the bridge.

Yours very truly,

JOHN PATTERSON
Attorney General

August 25, 1958

Honorable S. H. Dabbs
Superintendent
Etowah County Schools
Gadsden, Alabama

County Boards of Education — Schools — Labor—Employment, Employers and Employees.

1. County boards of education may not, in absence of constitutional or statutory authority, recognize labor union and lawfully enter into a contract with it concerning wages, hours of employment and working conditions.

2. Employees of county boards of education may not lawfully strike or picket or conduct a work stoppage against the board

whether members of a union or not, and such action may be enjoined.

3. It is not lawful to any extent for a labor union, or its members, or any other person to cause or instigate against a county board of education a strike, picketing, work stoppage or concerted action to hinder, delay or prevent the county board from performing its regular functions.

4. Act No. 720, General and Local Acts 1953, page 975, does not authorize employees of county boards of education to belong to labor unions or to strike or bargain collectively with school boards.

5. Where membership of school employees is not prohibited, county boards of education may, in their discretion, deduct dues from wages of such an employee at his expense, upon being requested to do so by a voluntary written authorization of the employee, and pay the dues to the union designated by the employee. Such request may be revoked at any time by the employee.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of August 18, 1958, is as follows:

"The Etowah County Board of Education hereby requests that the Attorney General of Alabama give his opinion in writing to the Etowah County Board of Education on the following questions of law:

"1. (a) Can a county Board of Education lawfully enter into a contract with a labor organization or union concerning grievances, wages and conditions of work?

"(b) Can a labor organization or union, of which County employees are members, lawfully demand or require the County Board of Education to recognize it as such and enter into a contract with the labor organization or union?

"2. Should a labor organization or union of which county employees are members, demand the County Board of Education to recognize it as the representative of the employees and enter into a contract with it concerning grievances, wages and working conditions and the County Board

of Education declines to do so, is it lawful for such labor organizations or unions to conduct a strike against the Etowah County Board of Education to enforce its demands?

"3. May such labor organization or union lawfully engage in a work stoppage, concerted action or picketing, peaceful or otherwise, in efforts to induce or prevent others not to be employed by the County Board of Education or not to perform work for the county in its legal functions?

"4. In the event of a union, its members or sympathizers conduct a strike, or a work stoppage or concerted action or picketing in furtherance of the strike is the Etowah County Board of Education empowered or authorized by law to institute suit in its name for an injunction to restrain and prevent the union, its members, and sympathizers from conducting a strike, work stoppage, concerted action, or picketing and execute such bond as may be required for the issuance of temporary injunction.

"5. To what extent, if any, is it lawful for a union or its members or any other person to cause or instigate against a County Board of Education a strike, picketing, work stoppage or concerted action to hinder, delay or prevent the County from performing its regular functions.

"6. Has 1953 Acts p. 975 No. 720 known as the Solomon Act changed the law as it existed prior to its passage with respect to any of the propositions stated above?

"7. (a) Can the County Board of Education lawfully deduct dues from the wages or salary of an employee upon being requested to do so by a voluntary written authorization and pay the dues to the union designated by the employee.

"(b) If your answer to the above is in the affirmative can the employee revoke such request at any time."

It is my opinion that your questions 1(a) and (b), 2 and 3 should be answered in the negative.

This office has ruled that neither county boards of education nor city boards of education has authority to enter into contracts with a labor union, recognizing such union as the bargaining agent of their employees; that they may require that its employees not belong to a labor union, either as a condition precedent to employment or as a condition subsequent to the retention of employment. Quarterly Report of Attorney General, Vol. 45, page 43.

The same has also been ruled by this office as to employees of the University of Alabama, cities and counties. Quarterly Report of Attorney

General, Vol. 45, page 19; Vol. 44, page 36; Vol. 41, page 55. The latter two opinions concerned the City of Gadsden and Etowah County.

Question No. 4 is answered in the affirmative.

Question No. 5 is answered by saying it is not lawful to any extent.

Question No. 6 is answered in the negative.

In answer to question 7(a) and (b), if the County Board of Education has no adopted rule against union membership of its employees, it may deduct dues from the wages or salary of an employee upon being requested to do so by the voluntary written authorization of the employee. This request may be revoked at any time by the employee.

The reasons for the various answers above are given in an opinion of this office reported in Quarterly Report of Attorney General, Vol. 87, page 35, copy of which is enclosed.

Yours very truly,

JOHN PATTERSON
Attorney General

August 25, 1958

Hon. J. C. Grady
Judge of Probate
Chambers County
LaFayette, Alabama

Airports—Counties—Gasoline and Gasoline Tax—Gasoline Fund —Municipalities.

1. A county may not use its funds or equipment to assist in the construction of an airport which is owned by a municipality.

2. An airport may be jointly owned by a county and a municipality.

3. County road equipment purchased with monies from a county's general fund may be used in the construction of an airport jointly owned by a county and a municipality.

4. County road equipment purchased with monies derived from the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, may not be used in the construction of an airport jointly owned by county and a municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of August 9, 1958, is as follows:

"The County Commissioner's Court has two questions which they desire a ruling on by your office. The questions are as follows:

"1. Can the County Commissioners use county road equipment to assist in the construction of a municipal owned airport?

"2. Can the County Commissioners use county road equipment to assist in the construction of an airport owned jointly by the county and a municipality?"

There is no statute of this state which authorizes a county to use its fund or equipment to assist in the construction of an airport which is owned by a municipality. Therefore, your first question is answered in the negative. Cf. Quarterly Report of Attorney General, Vol. 87, p. 15.

An airport may be jointly owned by a county and a municipality. Act No. 393, General and Local Acts 1945, p. 612.

Limitations are placed by law on the use of certain county funds. Therefore, the use which may be made of county equipment is dependent upon which county fund was used to purchase said equipment. Quarterly Report of Attorney General, Vol. 90, p. 21. Your request does not state which county fund was used to purchase the road equipment mentioned therein.

Of course, a county's general fund may be used for any county purpose. Therefore, if the county road equipment to which your request refers was purchased with monies from your county's general fund, I am of the opinion that said equipment may be used in the construction of an airport jointly owned by your county and a municipality.

The Constitution of Alabama 1901, Section 215, provides that the special taxes authorized thereunder may be used for the construction of public

buildings, bridges and roads. In an opinion reported in Quarterly Report of Attorney General, Vol. 78, p. 48, this office held that an administration building of a county owned airport is a public building. Said opinion also held that an airport runway is a part of the public building since an administration building, without a paved runway, would be useless. Therefore, if the county road equipment to which your request refers was purchased with monies derived from the special taxes authorized by Section 215, supra, I am of the opinion that said equipment may be used to construct an administration building and a runway at an airport jointly owned by your county and a municipality.

A county's share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, may be used only for the construction, maintenance, supervision and policing of the public roads and bridges in the county. Quarterly Report of Attorney General, Vol. 89, p. 16. Therefore, if the county road equipment to which your request refers was purchased with monies derived from the gasoline tax levied by Section 647, as amended, supra, I am of the opinion that said equipment may not be used in the construction of an airport jointly owned by your county and a municipality.

Very truly yours,

JOHN PATTERSON
Attorney General

August 28, 1958

Hon. Arthur Joe Grant
Commissioner of Revenue
State of Alabama
CAPITOL

Licenses—License Inspectors—Costs and Fees—Vending Machines.

1. License inspectors are entitled to one citation fee for each citation served.

2. License inspectors are entitled to only one citation fee where a single citation is served for delinquent licenses on vending machines.

3. Where a single citation is served for two or more delinquent licenses due under different licensing sections of the Revenue

Laws license inspector is entitled to one citation fee.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of August 19, 1958, is as follows:

Title 51, Section 835(g), Code of Alabama 1940 provides: in part, as follows:

"'. . . All citations to delinquents shall be served by any lawful officer, or by the license inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents for each citation served, to be taxed against the delinquent. . .'

"Your official opinion is requested with respect to the following questions:

"1. Where a single citation for delinquent licenses on vending machines due to be licensed under Title 51, section 613, as amended, Code of Alabama 1940, is issued either by a county license inspector or by a duly authorized agent of the department of revenue and such citation is for more than one machine (say 200), what is the proper citation fee to be collected— a fee of $1.50 for the one citation issued or a fee equal to $1.50 times the number of machines included in the citation?

"2. Is your answer the same where the single citation is for two or more delinquent licenses due under different licensing sections of the Revenue Laws?"

Title 51, Section 835(g), Code of Alabama 1940 provides:

". . . All citations to delinquents shall be served by any lawful officer, or by the license inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents for each citation served, to be taxed against the delinquent."

The language of the above code section indicates that the legislative intent is that only one citation fee be collected for each citation served against a delinqent. There is no provision made for the collection of a larger citation fee where more than one violation is cited and the citation served upon the delinquent licensee.

It has been uniformly held that a citation fee is not collectible unless there has been personal service on the delinquent. —Quarterly Report of Attorney General, Vol. 30, page 41.

Both of your questions deal with a situation in which a single citation has been issued to the delinquent licensee.

My opinion is as follows:

1. My answer to your first question is that the proper citation fee to be collected is one dollar and fifty cents for one citation served.

2. The answer to your second inquiry is that where only one citation is served, only one citation fee of one dollar and fifty cents may be collected.

Very truly yours,

JOHN PATTERSON
Attorney General

August 28, 1958

Hon. M. W. Forman
Judge of Probate
St. Clair County
Ashville, Alabama

Counties—Gasoline and Gasoline Tax—Gasoline Fund—Roads and Bridges—Municipalities.

1. A county may use proceeds derived from the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, to construct a "farm to market road" a part of which is located within the corporate limits of a municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of August 26, 1958 is as follows:

"No. 1: If a county can use its gas tax money for the construction or paving of a county road which enters a portion of a municipality and extending on beyond the municipality. This road in question starts at the Bankhead highway, which is known as #78, and goes through a portion of a municipality, crossing State highway #231 and continuing on through the country, terminating at State highway Ala. 174. This road has been approved by the State Highway Department and placed on the Farm to Market Road program, as amended.

"No. 2: We have another road leading from the Bankhead highway, #78, at Pell City towards Cropwell, connecting State highway #231. This is a Farm to Market road and was built several years ago and since it was built the Town of Pell City extended its corporate limits to where most of this Farm to Market road is located. A short time back the highway department asked for bids on the resurfacing of this road, along with other roads that were damaged after the snow of this year. This contract has been awarded to the low bidder, and the funds to be used in the resurfacing is the Farm to Market road money and the county gas tax money. Please advise if we can, under this Farm to Market Road Act as Amended, resurface this road."

In general, county funds derived from the proceeds of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, p. 73, may not be used to construct streets within a municipality, either directly or by use of county forces, equipment or materials. Quarterly Report of Attorney General, Vol. 90, p. 21.

In an opinion reported in Quarterly Report of Attorney General, Vol. 90, p. 7, this office held that highways located within the corporate limits of a municipality are streets as distinguished from county roads unless the legislature authorizes such highways to be considered as roads.

Act No. 329, General Acts 1943, p. 311, known as the Farm to Market Road Act of 1943, as amended by Act No. 41, General Acts 1945, p. 47, reads in part as follows:

"The words 'county roads' as herein used shall mean all public roads (including bridges) within a county and continuing into or through the corporate limits of any city or town in such county which are not a part of the state highway system and which are sometimes called 'farm to market roads'. . ."

This office has held that a road may be constructed within a municipality under the provisions of the Farm to Market Road Act of 1943, supra. Quarterly Report of Attorney General, Vol. 71, p. 17.

Therefore, since the legislature has designated that part of a Farm to Market Road which is located within a municipality as a county road as distinguished from a municipality street, the gasoline tax levied by Section 647, as amended, supra, may be used to construct or reconstruct such roads.

Premises considered, I am of the opinion that your county may use the proceeds of its share of the gasoline tax levied by Section 647, supra to perform the work contemplated on both the roads mentioned in your request, even though parts of said roads are located within the corporate limits of municipalities.

Very truly yours,

JOHN PATTERSON
Attorney General

September 8, 1958

Hon. Herman L. Nelson
State Highway Director
State of Alabama
Montgomery 4, Alabama

Compensation—Contractors—Highways and Highway Department.

1. Where a highway contractor's operation is delayed or curtailed through the fault of the State Highway Department, he may be paid additional compensation on the basis of his actual loss, but not on the basis of what he might have earned, during the period of such delay or curtailment, provided he furnishes affidavit evidence of his actual loss, under Section 104.14, Standard Specifications of the State Highway Department, approved July 1, 1950.

Opinion by Assistant Attorney General Mentz.

Dear Sir:

Your request for an official opinion bearing date of July 11, 1958, is as follows:

"I am attaching correspondence from McWhorter Construction Company, contractor on Project UG-272 (5), Calhoun County, concerning a

claim for additional compensation.

"Section 104.14 of the Standard Specification of the State Highway Department approved 1950 provides as follows:

" 'Delays Not Fault of Contractor. If unreasonable delays occur in reaching a settlement with the contractor on changes made in the plans or specifications due to a failure of the engineer to act, or if there are delays due to the failure to provide the necessary stakes after a 48-hour notice in writing to the engineer that such stakes are needed, the Contractor shall be paid such amount as the engineer may consider to be fair and reasonable compensation for such part of the Contractor's actual loss as, in the opinion of the Engineer, was unavoidable and could not have been reduced.'

"I will appreciate your advising me if in your opinion it will be satisfactory for the State Highway Department, under the foregoing section of the Specifications, to make settlement with the contractor not on the basis of his claim for the amount he might have earned but on the basis of actual losses.

"See also Special Provision 892 marked in red pencil page 7 and 8."

In his letter dated April 7, 1958, Mr. G. E. McWhorter, Jr., of McWhorter Construction Company states that his company's estimates for the three and one-half month period from July 1, 1956, to November 15, 1956, during which time the company's operations were curtailed through no fault of its own, totaled $15,383.26, whereas for the three and one-half month period immediately preceding July 1, 1956, when the company's operations were normal, its estimates totaled $43,524.38. He claims that his company's compensation for the period from July 1, 1956 to November 15, 1956, should be $28,141.12, which figure results from a computation of his estimates during the immediately preceding three and one-half month period of normal operations less the amount of his estimates during the three and one-half month period of curtailed operations.

You informed me verbally that your project engineer stated that, because of his failure to enforce Special Provision No. 892, dated September 30, 1955, which calls for the coordination of work by the various contractors on the projects, McWhorter Construction Company's operations were delayed and it was forced to maintain at the project site certain personnel and equipment on a stand-by or, at least, greatly reduced operating basis from July 1, 1956 to November 15, 1956.

It is my opinion that, under Section 104.14, which is quoted in your letter and which you have informed me is incorporated in the contract between the State Highway Department and McWhorter Construction Company, the State Highway Department may pay said company additional com-

pensation, not on the basis of the amount the company might have earned, but on the basis of the company's actual losses, during the period of time when its operations were curtailed for reasons over which it had no control, provided that the company substantiates its claim therefor by submitting evidence, in affidavit form, showing what its pay rolls, equipment costs, and actual losses were during said period of time.

The Alabama courts, in personal injury suits, permit the injured party to prove his loss of commissions or earnings during the period of disablement in order to aid the jury in estimating just compensation for being prevented by the injury from engaging in his work. **City of Birmingham v. Levens**, 241 Ala. 47, 200 So. 888. However, our courts adhere to the doctrine that, as a general rule, recovery is not to be allowed for the loss of business or profits from invested capital or the labor of others no matter how prominent the injured person's part therein or how essential to its successful operation his connection with it may be. **Wilson and Company v. Sims**, 250 Ala. 414, 34 So. 2d 689.

"Loss of earnings" is distinct from "loss of profits," in that "earnings" are the fruits of labor, the price of services performed, while "profits" represent net gain made from the prosecution of some business after payment of all expenses incurred, and an injured person is entitled to compensation for loss of earnings though generally not for loss of business or profits. **Wilson and Company v. Sims**, supra.

In **Deslandes v. Scales**, 187 Ala. 25, 65 So. 393, it was held that loss of profits from the boarding house conducted by the tenant because of the landlord's breach of covenant to repair was not recoverable. In **Welch v. Evans Bros. Construction Company**, 189 Ala. 548, 66 So. 517, the court ruled that the plaintiff was not entitled to recover loss of profits in an action for damages to goods resulting from the act of a contractor company in leaving uncovered a hole in the roof of the building which it was repairing and through which it rained on the plaintiff's goods. In **Wilson and Company v. Sims**, supra, the court held that loss of profits during the period the plaintiff's commercial truck was laid up for repairs was not to be considered as an element of damages for injury to the vehicle.

Where recovery of profits is denied, it is not because they are profits, but because there is no criterion by which to estimate the amount with the proper certainty. **Deslandes v. Scales**, supra. Profits speculative, conjectural, or remote, are not generally regarded as an element in estimating damages. **Taylor v. Shoemaker**, 34 Ala. App. 168, 38 So. 2d 895. However, where the evidence furnishes date from which the jury may accurately ascertain them, profits are recoverable. **Wilson v. Stocks**, 231 Ala. 58, 163 So. 606. The requisite to the allowance of profits as an element of damages is some standard, as regular market values, or other established data, by reference to which amounts may be satisfactorily ascertained. **Lambert v. Jefferson**, 34 Ala. App. 67, 36 So. 2d 583, reversed 251 Ala. 5, 36 So. 2d 594.

The quoted Section 104.14 provides that fair and reasonable compensation shall be paid for the contractor's actual loss as was unavoidable and could not have been reduced. It is clear that in this instance McWhorter Construction Company is seeking to recover, not only its actual losses, but the anticipated profits it claims it would have made had its operations been normal. It assumes that its anticipated profits during the three and one-half month period of its curtailed operations would be the same as its actual profits were during the immediately preceding three and one-half month period when its operations, presumably, were normal.

It is my belief that in this case McWhorter Construction Company's claim for anticipated profits has as its basis speculation and conjecture, and furnishes no criterion by which such anticipated profits may be determined satisfactorily or with the proper certainty. The profits of a highway contractor are contingent upon his professional ability and wisdom, upon the availability and cost of labor and materials, upon weather conditions, upon the efficiency and industry of employees, upon the effectiveness and durability of machinery, and upon the possibility of encountering unforeseen conditions or circumstances which might impede or accelerate the progress of his work.

McWhorter Construction Company may well have been able to work at full capacity, at maximum efficiency, and at minimum costs during the three and one-half months immediately preceding July 1, 1956, but there is no reasonable certainty that it would have operated in a similar manner during the three and one-half month period beginning July 1, 1956.

For these reasons, and in view of the quoted Section 104.14 and the cases which I have cited, I think that it would be proper to pay the company only for its actual substantiated losses during the period from July 1, 1956 to November 15, 1956.

Very truly yours,

JOHN PATTERSON
Attorney General

September 10, 1958

Honorable Howard Kirby,
Clerk
Circuit Court of Etowah County
Gadsden, Alabama

Juveniles—Juvenile Court—Records.

Records of cases before Juvenile Court must be withheld from

indiscriminate public inspection and information therefrom cannot be made available to governmental agencies not authorized to inspect the records.

Opinion by Assistant Attorney General Prestwood.

Dear Sir:

Your request for an official opinion bearing date of September 5, 1958, is as follows:

"Please refer to Section 353, Title 13 of the 1940 Code and render to me your opinion on the following matter:

"As Clerk of the Juvenile Court of Etowah County I receive inquiries from Draft Boards, Civil Service Boards, and various Government Agencies as to whether or not a case has ever been filed in said Court involving a named person and if so the disposition.

"Am I, as Clerk of the Juvenile Court, authorized under the law to give said information to said Boards or agencies regarding any case on Juvenile Docket involving children under the age of sixteen years?

"If I am not as Clerk authorized to give said information, is the Judge of said Court authorized to do so?"

Title 13, Section 353, Code of Alabama 1940 provides as follows:

"The juvenile court shall keep for the hearing of cases involving children under the age of sixteen years a docket which shall be separate and distinct from any other docket kept in said court; and the orders and decrees of the court relating to such cases shall be entered in a separate minute book. The court shall have the power, in the hearing of any case involving any child under the age of sixteen years, to exclude the general public from the room where said hearing is held, but shall admit thereto such persons as, in the judgment of the court, have a direct interest in the case. The records of all such cases shall be withheld from indiscriminate public inspection but such records shall, in the discretion and under the orders of the judge, be at all reasonable times open to inspection by the child, its parents, or guardian, its attorney, or attorney for its parent or guardian, and the state department of public welfare or its accredited agents. The hearing of all cases where children are involved shall be held at a different time from the hearing of other cases in the probate court. It shall be the duty of the judge of the court so to conduct the hearing as to disarm the fears of the child and to win its respect and confidence." (Emphasis supplied.)

I am of the opinion that one of the chief purposes of juvenile court legislation is to conceal the identity of youthful violators so that a rehabilitation program can be instituted free from problems of overcoming public chastisement. Use of the court's records for the causes outlined in your request is not in keeping with that purpose, nor is it within the allowable exceptions in Section 353, supra. I am therefore of the opinion that no officer of the juvenile court is authorized to make available case information to the agencies mentioned in your request.

Sincerely,

JOHN PATTERSON
Attorney General

September 17, 1958

Honorable Sam Drinkard
Tax Assessor
Marengo County
Linden, Alabama

Taxation—Exemptions—Corporations

Exemptions from ad valorem tax authorized in Title 51, Sections 3 and 6, as amended, Code of Alabama 1940 are not applicable to stocks of goods, wares and merchandise, raw materials, supplies, and manufactured articles.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of September 6, 1958, is as follows:

"Please render an official opinion on the following tax matter.

"Enclosed is a copy of the assessment of Marengo Mills, Demopolis, Alabama, for the tax year beginning October 1, 1957, and ending October 1, 1958.

"Please state if items listed on line 20 of said assessment, which reads as follows, 'Supplies, raw materials and manufactured articles of manufacturers, not including products manufactured within twelve months

and stored at point of manufacture,' valued at $46,617, are exempt from ad valorem taxes for county purposes, other than for county school and school district purposes, under the following order from the Marengo County Board of Revenue, to-wit:

"(3) That there be and there is hereby remitted the taxes assessed for County purposes, except for county school and school district purposes, against the plant, works, machinery and other equipment of Marengo Mills, located upon the aforesaid premises of Marengo Industries, Inc., and all additions thereto, or extensions thereof, and also on all of the capital stock of said corporation, employed in said factory or plant, and all increase of said capital stock made for the purpose of making additions thereto or extensions thereof for the tax years of 1950-1951 to 1959-1960, inclusive; it being the intention hereof to exempt and there is hereby exempted from County taxes, except county school and school district taxes, all property of Marengo Mills, and its capital stock, employed by it in the aforesaid enterprise for the period aforesaid, and to the full extent as authorized by the statutes of the State of Alabama;

"I dislike very much to have to continue worrying you with reference to matters of this kind but it is almost impossible for me as Tax Assessor to determine just what properties the Legislature intended exempting from taxation under Title 51, Sec. 3 & 6, in connection with the several orders of exemptions I have from the State Department of Revenue and the Marengo County Board of Revenue. If I could determine just what the Legislature intended exempting, then I could determine whether taxes are due on certain items in a number of corporation assessments where orders of exemption have been issued. Otherwise, I do not know any way to determine what properties are taxable or exempt other than having you rule on each item in question.

"Is it your opinion that the Legislature intended exempting only the plant, factory, or building, along with the machinery, works and all equipment constituting a part of or used in connection with the manufacture of certain items, as described in Secs. 3 and 6, Title 51, or did the Legislature intend exempting also all articles, supplies, raw materials, and other various items or objects used in connection with the operation of such plant or factory in manufacturing said items as described in Secs. 3 and 6, Title 51, Code of 1940.

"Also, is the property listed on line 20 of this assessment exempt from ad valorem taxes under authority of Sec. 3 as amended by Act No. 260, General and Local Acts 1951, through Section 9, Title 51, Code of Alabama 1940.

"The property described on line 20 of the attached copy of assessment of Marengo Mills for the tax year 1957-1958 is located within the city

limits of the City of Demopolis. Is said property exempt from taxation for the City of Demopolis under Section 3, Title 51, Code of Ala., 1940, or has the City of Demopolis authority under the law, any law, to exempt said property from taxation for the City of Demopolis, should this be the desire of the governing body of the City of Demopolis."

On August 13, 1958, an informal opinion regarding a similar question was given you by this office as follows:

"This will acknowledge receipt of your letter of July 23, 1958 concerning the application of an exemption order issued by the State Department of Revenue to the stock of goods, wares, and merchandise and other property listed on line 13 of the assessment sheet of the Tuloma Gas Products Company for the tax year 1958. You inquire as to whether or not the property referred to is exempt fom ad valorem tax by virtue of said exemption order.

"Title 51, Section 6, as amended, Code of Alabama 1940, authorizes the Department of Revenue to exempt from ad valorem taxes for State purposes certain plants, industries, and factories, including the works, machinery, and all other equipment constituting a part of, or used in connection with, such plants, industries, or factories.

"It is my opinion that the stocks of goods, wares, and merchandise and the property listed on line 13 of the assessment sheet in question are not covered by the exemption order issued by the Department of Revenue pertaining to Tuloma Gas Products Company. I am also of the opinion that there is no authority granted in Section 6, supra, to exempt such property from ad valorem tax."

Title 51, Section 3, as amended, Code of Alabama 1940, authorizes the court of county commissioners or other court or board having a like jurisdiction of any county and the constituted authorities of any city or town in which an industry proposes to locate to exempt for a period not exceeding ten years from ad valorem tax for all county and municipal purposes, except for any schools and school district purposes, certain plants, industries, or factories and the works, machinery, and other equipment of such plants, industries, or factories.

It is my judgment that the conclusion reached in the opinion of August 13, 1958, quoted above, is also aplicable to the exemption authorized by Title 51, Section 3, supra, and that the items listed on line 20 of the assessment sheet of Marengo Mills, Demopolis, Alabama, for the tax year October 1, 1957 through September 30, 1958 are not exempt from ad valorem tax for county purposes under the order issued by the Marengo County Board of Revenue quoted above. From the language found in Title 51, Sections 3 and 6, supra, it appears that the authority to grant the exemption is applicable only to the building in which the plant, industry, or

factory is located, and the works, machinery, and equipment constituting a part of, or used in connection with the operation of such plant, industry, or factory.

It is my opinion that items listed on the assessment sheet such as stocks of goods, wares, and merchandise, supplies, raw materials, and manufactured articles, such items being referred to in your inquiries, are not included in the types of property which may be exempt from ad valorem tax under the provisions of Title 51, Sections 3 and 6, as amended, Code of Alabama 1940.

Very truly yours,

JOHN PATTERSON
Attorney General

September 19, 1958

Hon. Wyman Gilmore
Circuit Solicitor
First Judicial Circuit
Butler, Alabama

United States—Intoxicating Liquors.

The Laws of the State of Alabama and of municipalities, concerning prohibited liquors or beverages, are applicable within an area owned by an agency of the Federal Government when no deed or cession has been made by the Governor nor consent to the purchase of said land given by the Legislature.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 21, 1958 is as follows:

"On Friday, July 18, I briefly discussed a problem that the Sheriff and I have facing us in Clarke County, Alabama. During our conversation you suggested that I remind you of it again and that you believed you could help us with it. I will set out the few facts that I know.

"The City of Thomasville, Clarke County, Alabama, purchased a tract of land which they deeded to the United States Government with the agreement that the Government would erect a U. S. Air Force Radar Station on the land. The land is located in Clarke County, approximately one mile from the City of Thomasville. The Radar Station has been built and approximately fifty U. S. Air Force Personnel are located there.

"The Commanding Officer has informed the Sheriff that he has opened a beer garden or parlor within the bounds of this tract of land. The citizens of Thomasville and the surrounding communities are demanding that the Sheriff take action against this violation.

"I would appreciate it if you would render me an opinion as to what action we can take or what authority the Sheriff would have in this matter.

"The Mayor of the City of Thomasville has asked me the question also whether he has or the City of Thomasville any jurisdiction over this matter.

"In the event that we are unable to do anything and do not have any jurisdiction over the post then I would like permission to publish in the County paper your opinion."

In addition to your inquiry, you have informed me that the said Federal radar station operated by the United States Air Force is within one and one-half miles of the city limits of Thomasville, Clarke County, Alabama, and is in fact approximately one-quarter of a mile from the city boundaries. Of course, if these facts are correct, the station is located within the police jurisdiction of Thomasville, Alabama, and the city court or recorder's court would have territorial jurisdiction over said area (Title 37, Sections 9 and 594, Code of Alabama 1940), as well as the county court in misdemeanor cases.

I am of the opinion that the laws of the State of Alabama and ordinances of the City of Thomasville apply to the areas occupied by the radar station, and persons on said Federal reservation, so far as the laws prohibiting the possession or sale of intoxicating liquors or malt or brewed beverages are concerned, are on the same footing as other persons in Clarke County, there being no exclusive jurisdiction vested in the United States over said area.

It appears from your inquiry that the City of Thomasville acquired the tract of land in question which is occupied by the radar station and deeded this tract to the United States Government with the understanding or agreement that a radar station would be erected on the land, I assume,

therefore, that the Federal Government owns title to this property and that it was conveyed with adequate consideration.

The Consitution of the United States, Article 1, Section 8, Clause 17, provides as follows:

"The Congress shall have power. . . .

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

According to the facts in your inquiry, the Government of the United States may have purchased the land from the City of Thomasville. I find no evidence, however, that said purchase was made with the consent of the Legislature of the State of Alabama; nor do I find that the Governor of Alabama has ceded jurisdiction in any manner to the United States over such tract of land according to the provisions of Title 59, Sections 18, 19, Code of Alabama 1940. I am informed by a reliable official in the Governor's Office that no such cession of jurisdiction to the United States has been made.

It is my opinion, therefore, that the laws of the State of Alabama and of the City of Thomasville, concerning prohibited liquors or beverages, are applicable to persons and places within the above described radar station, and in the absence of a deed of cession by the Governor or the consent of the Legislature of Alabama, this area must be regarded as subject to the laws of the State of Alabama and the City of Thomasville.

Very truly yours,

JOHN PATTERSON
Attorney General

September 19, 1958

Hon. J. M. McCullough, Jr.
Commissioner
Board of Corrections
State of Alabama
Montgomery 7, Alabama

Prisons and Prisoners—Convicts—Sentences—Corrections and

Institutions, Department of.

Without express statutory authority to the contrary, if a judgment of conviction is reversed at a time when the defendant is serving the sentence imposed, and, following a new trial and a second conviction, a new sentence is imposed, the defendant is not entitled to credit against the second sentence time served under the original sentence.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of August 6, 1958, is as follows:

"Re: Harold Shiflett
Alabama: #70661

"On September 24, 1954, the above named subject was sentenced from Talladega County to life in prison for the crime of murder 1st degree. He appealed the sentence but elected to serve on sentence pending the outcome of his appeal.

"On March 12, 1955 subject was discharged by Court Order and given a new trial and received 10 years for murder 2nd. degree.

"The question now arises as to whether or not this man be allowed the time he served on his original sentence while awaiting the outcome of his appeal.

"Your opinion in this matter will be highly appreciated."

Title 15, Section 372, Code of Alabama 1940, as amended by Act No. 803, Acts of Alabama 1951, page 1401, provides as follows:

"When any question of law is reserved in case of a felony, and it shall be made known to the Court that the defendant desires to take an appeal to the Supreme Court or to the Court of Appeals, judgment must be rendered against the defendant but execution thereof must be suspended pending the appeal and the defendant held in custody, but if the sentence is for a term not exceeding twenty years the judges must direct the clerk of the Court in which the conviction is had to admit the defendant to bail in a sum to be fixed by the Judge with sufficient surety, conditioned upon his appearance at the Court from time to time thereafter as fixed by the Court to abide such judgment

as may be rendered on the Appeal, and the provisions of this Act shall apply to convictions already had in the Courts of this State. All proceedings for forfeiture of bail and arrest under this Section shall be had and conducted as is otherwise provided in this Code for such proceedings."

Title 15, Section 373, Code of Alabama 1940, provides as follows:

"In all cases where there is judgment suspending sentence, at any time before the transcript has been forwarded to the clerk of the appellate court, the defendant in person, or by his attorney, may waive the benefit of the suspended sentence by filing in the office of the clerk of the court in which the case was tried, a statement in writing to that effect, signed by himself or his attorney of record, and the clerk must then enter the fact and date of such waiver of suspension of sentence upon the margin of the record of the judgment and shall report said convict to the director of the department of corrections and institutions, as in cases where there is no judgment or suspension of sentence; but such waiver of suspension shall not affect the appeal."

Your request refers to the effect of such a waiver of sentence when the ease is reversed and the defendant retried. Alabama courts have held that time served under an invalid or void sentence is not a deterrent to resentencing, nor is it violative of former jeopardy rights. **Ex parte Gunter**, 193 Ala. 486, 69 So. 442. In its holding, the court intimated that the prisoner resentenced would not be entitled to credit for time served under his void sentence.

This holding is in line with the general rule throughout the United States. The courts generally seem to agree that, without express statutory authority to the contrary, if a judgment of conviction is reversed at a time when the defendant is serving the sentence imposed, and, following a new trial and a second conviction, a new sentence is imposed, the defendant is not entitled to credit against the second sentence for time served under the original sentence. 35 A. L. R . 2d 1285.

In the case of **Re DeMeerlet**, 323 Mich. 287, 35 N. W. 2d 255 cert. den. 336 U. S. 946, the prisoner served twelve years in the State Penitentiary under a sentence for murder before obtaining his release on habeas corpus. On retrial he was given an indeterminate sentence for manslaughter, the maximum of which was less than the time already served under the void murder sentence. The prisoner sought on habeas corpus to obtain his release on the grounds that he had already served more than the maximum time allowed under his second sentence. The Michigan court refused his plea, citing the general rule.

It is, therefore, my opinion that the time served by Harold Shiflett, under his first sentence, may not be credited against his second sentence.

Very truly yours,

JOHN PATTERSON
Attorney General

September 30, 1958

Hon. James H. Horn
Superintendent
Department of Insurance
Montgomery 4, Alabama

Taxation—Insurance—Claims—State Board of Adjustment.

1. State Board of Adjustment is authorized to determine claim for refund of overpayment of premium tax filed within one year after final date for filing the premium tax statement and payment of premium tax.

2. Claims for refund of premium tax overpayment should be filed with the State Board of Adjustment for determination.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of September 18, 1958, is as follows:

"We are enclosing a copy of a letter received from an insurance company, requesting a refund of premium tax overpayment. The overpayment was brought about by the company's failure to compute its premium tax properly.

"In connection with this request and similar ones which occur from time to time, please give us your opinion on the following questions:

"1. If an overpayment of premium tax is made through error or oversight on the part of a company, can the company recompute its premium tax and be allowed a refund of any overpayment after the final date for filing the premium tax statement and payment of premium tax?

If so, what would be the maximum limitation of time in which a company might regress and discover errors of previous years and make application for such refunds?

"2. If such refunds are allowable, should all such requests be directed to the State Board of Adjustment for determination. Reference is made to an opinion rendered by your office on June 12, 1944, which was superseded by an opinion of March 12, 1954, and also to a letter directed to Honorable H. A. Longshore, Superintendent of Insurance, date October 13, 1955, both of which deal with this particular subject."

In answer to your first question, I am of the opinion that the statute creating the State Board of Adjustment confers jurisdiction on this Board to consider the claim, when so presented to it within one year after the final date for filing the premium tax statement and payment of premium tax, and may make an award for the refund of premium tax overpayment erroneously paid to the Superintendent of Insurance.

Act No. 540, General and Local Acts 1953, p. 755 (Title 55, Section 334, 1955 Cumulative Pocket Part, Code of Alabama 1940) provides that the Board of Adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider all claims for money overpaid on obligations to the State of Alabama, or any of its agencies, commissions, boards, institutions or departments; also all claims for money voluntarily paid to the State of Alabama, or any of its agencies, commissions, boards, institutions or departments, where no legal liability existed to make such payment, etc.

Act No. 540, supra, further states that the Board of Adjustment has no jurisdiction to settle or adjust any matter or claim of which the courts of this state have, or had jurisdiction.

No provision of law permitting a refund of such premium tax by the insurance department was found. Quarterly Report of Attorney General, Vol. 74, p. 70.

Act No. 583, General Acts 1943, p. 585 (Title 55, Section 335, 1955 Cumulative Pocket Part, Code of Alabama 1940) prescribes that the time for presenting such a claim for refund to the Board of Adjustment as one year after the cause of action accrues.

My answer to your second question is that all such claims for refund of premium tax overpayment should be directed to the State Board of Adjustment for determination.

Very truly yours,

JOHN PATTERSON
Attorney General

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